Supreme Court, U.S.
FILED
JAN 21 1998
CLERK

(2)

No. 97-1022

In The

Supreme Court of the United States

October Term, 1997

ALBERT HALE, President of the Navajo Nation and the NAVAJO NATION,

Petitioners,

vs.

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council and THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE HOPI TRIBE

TIMOTHY G. ATKESON
Counsel of Record
DAPHNE WERTH
ARNOLD & PORTER
Attorneys for Respondent The Hopi Tribe
Suite 4000
1700 Lincoln Street
Denver Colorado 80203
(303) 863-1000

144251

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

25 pp

QUESTIONS PRESENTED[1]

1. Whether the Ninth Circuit correctly determined that the district court did not abuse its discretion by admitting the expert testimony of Dr. John Workman — a range economist — on the valuation of grazing opportunities on Hopi lands.

2. Whether the Ninth Circuit correctly applied comment b to § 931 of the Restatement (Second) of Torts to award the Hopi Tribe damages for lost grazing opportunities on vacant ranges.

---

1. The Navajo Nation also raised an argument regarding the liability of the United States. The Hopi Tribe has settled with the United States and does not take a position on that issue.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. Brief History Of The Case.	1
B. Dr. Workman's Role In The Use And Damages Cases.	3
C. The District Court's Decision.	4
D. The Ninth Circuit Decision.	5
Reasons for Denying the Writ	6
I. This Case Is An Improper Vehicle For Certiorari On *Daubert*.	6
A. The *Daubert* Decision.	7
B. The Circuit Split Is Over *Daubert*'s Application To Applied Science Or Quasi-Scientific Experts, Not Over *Daubert*'s Application To Non-Scientific Experts.	8

Contents

Page

C. Resolution Of Petitioner's Supposed Split Would Not Affect The Outcome Of This Case. 12

D. Other Factors Counsel Against Accepting The Writ. 14

II. Whether It Is Equitable To Permit The Tribe To Recover Damages For Lost Grazing Opportunities On The HPL Is An Exceptionally Narrow Issue And Does Not Present An Important Question Of Federal Law. 15

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995) 10

Braun v. Lorillard, Inc., 84 F.3d 230 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2409 (1997) 11

Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996) 9, 10, 11, 12

Cook v. American Steamship Co., 53 F.3d 733 (6th Cir. 1995 10

Contents

	Page
Cummins v. Lyle Indus., 93 F.3d 362 (7th Cir. 1996) .	9
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)	4, 5, 6, 7, 8, 9, 10, 11, 12, 14
Daubert v. Merrell Dow Pharmeceuticals, Inc., 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995)	13, 14
Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) ..	7
Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183 (7th Cir. 1993)	11
General Electric Co. v. Joiner, 118 S. Ct. 512 (1997)	13
Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974)	2
Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963)	1, 2
Masayesva v. Hale, 118 F.3d 1371 (9th Cir. 1997) ..	5, 15, 16
McCullock v. H.B. Fuller Co., 61 F.3d 1038 (2d Cir. 1995)	9
McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997)	9, 11

Contents

	Page
Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997)	10
Smelser v. Norfolk Southern Ry. Co., 105 F.3d 299 (6th Cir.), *cert. denied*, 118 S. Ct. 67 (1997)	9, 11
Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997)	9
Surace v. Caterpillar, Inc., 111 F.3d 1039 (3d Cir. 1997)	9
The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959)	13
Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996)	11
Watkins v. Telsmith, Inc., 121 F.3d 984 (5th Cir. 1997)	9
White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614 (1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994)	3
Statutes Cited:	
25 U.S.C. § 640d *et seq.*	2
25 U.S.C. § 640d-3	2

Contents

	Page
25 U.S.C. §§ 640d-17(a)(2)	2
25 U.S.C. §§ 640d-17(a)(3)	2
Rules Cited:	
Federal Rules of Evidence 702	7, 8, 9, 10
Sup. Ct. R. 10	6
Sup. Ct. R. 10(a)	12
Sup. Ct. R. 10(c)	6, 16
Sup. Ct. R. 15.2	15
Other Authorities Cited:	
Jennifer Laser, The Inconsistent Gatekeeping in Federal Courts: Application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to Nonscientific Expert Testimony, 30 Loy. L.A. L. Rev. 1379 (1997)	12
Lisa M. Agrimonti, The Limitations of *Daubert* and Its Misapplication to Quasi-Scientific Experts, A Two Year Case Review of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), 35 Washburn L.J. 134 (1995)	12
Pub. L. No. 85-547, 72 Stat. 403	1

Contents

	Page
Restatement (Second) of Torts § 931	6, 16
Restatement (Second) of Torts § 931 cmt. b	i, 15

The Hopi Tribe ("Tribe" or "Respondent") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

A. Brief History Of The Case.

The litigation from which this petition arises began in 1958, when Congress passed legislation authorizing a lawsuit to determine the respective rights and interests of the Tribe and the Navajo Nation (the "Nation" or "Petitioner") in a 2.5 million acre reservation in northern Arizona. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403. That reservation was created by executive order of President Chester Arthur in 1882. The order reserved the land for the Hopi and "such other Indians as the Secretary of Interior may see fit to settle thereon." Exec. Order of Dec. 16, 1882, *reprinted in*, *Healing v. Jones*, 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). In 1882, there were approximately 300 Navajo people within the area reserved. *Healing*, 210 F. Supp. at 145. By 1958, that number had increased to some 8800, *id.*, and serious disputes had arisen between the Tribe and the Nation over the use and ownership of the land. Pursuant to the 1958 Act, the Tribe sued the Nation and the United States in an effort to resolve the dispute.

In 1962, a three-judge panel of the district court held: (1) that the Tribe possessed exclusive title to an area of some 600,000 acres in the southern part of the 1882 Reservation known as "District 6" or "Land Management Unit 6"; (2) that the Tribe and the Nation held joint, undivided, and equal title in the rest of the Reservation — a 1.8 million-acre area that came to be known as the Joint Use Area ("JUA"); and (3) that Congress had not granted the court jurisdiction to partition the JUA. *Healing*, 210 F. Supp. at 191-92.

The Tribe was unable to make use of its interest in the JUA, however, because the Nation ousted them from possession. *Hamilton v. MacDonald*, 503 F.2d 1138, 1146 (9th Cir. 1974). The Tribe made repeated attempts to regain its interest in the JUA; all failed. Finally, Congress intervened in 1974. In comprehensive legislation, it attempted to effect a "Settlement of Rights and Interests" of the Tribe and the Nation. 25 U.S.C. § 640d *et seq.* (the "1974 Act"). The 1974 Act authorized the district court to make a "final adjudication, including partition of the [JUA]." 25 U.S.C. § 640d-3. After the Tribe and the Nation failed in mediation to agree upon a boundary line, the district court partitioned the area. The judgment of partition became final on April 18, 1979. The Tribe's portion of the JUA became known as the Hopi Partitioned Lands or the "HPL."

In addition to giving the district court authority to partition the JUA, the 1974 Act authorized a series of auxiliary actions for money damages. *See* 25 U.S.C. §§ 640d-17(a)(2) & (a)(3). Two of those actions are the subject of the Nation's petition. Section 640d-17(a)(2) authorized an action for the recovery of the "fair value of the grazing and agriculture use" by the Navajos of the Tribe's one-half interest in the JUA from 1962 to 1979 (the date of the *Healing* decision to the date of the partition). That action is known as the "Use Case." A second action, under section 640d-17(a)(3), is known as the "Damages Case" and allows the recovery of damages to the HPL from 1979 to 1995 (the date of partition to the date when the HPL can be fully restored) from Navajo overgrazing.

These two actions were consolidated for trial and the district court ruled in the Tribe's favor in both cases. The district court awarded the Hopi $18,187,132 in the Use Case and $3,167,388.84 in the Damages Case.[2]

2. A third action, known as the "Owelty Case," was also consolidated for trial and the subject of the Ninth Circuit opinion below. The Nation did not petition for certiorari on the Owelty Case.

B. Dr. Workman's Role In The Use And Damages Cases.

Dr. Workman provided expert testimony on how to value Navajo grazing on the JUA and the HPL in the Use and Damages Cases.

Dr. Workman has been a professor of Range Economics at Utah State for over twenty-five years. His courses have included Range Management, Range Economics, Rangeland Appraisal, and Range Economic Analysis. He has written the standard textbook on range economics and has authored dozens of peer-reviewed publications on subjects related to his testimony. His expert testimony on range economics, similar to the valuation testimony he provided here, has been admitted by the Claims Court on behalf of the United States. *See White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 665-66 (1987) (qualifying Dr. Workman as "an expert in appraisal and range management" and characterizing his proposed measure of damages as "especially persuasive."), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

In the Use Case, both the Nation and the Tribe agreed that the "fair value" of grazing use should be determined by estimating the amount of forage consumed by Navajo livestock from 1962 to 1979. The parties further agreed that the value of the forage consumed should be determined by multiplying the appropriate number of Navajo livestock by the fee that would have been charged for grazing during each year. Dr. Workman provided testimony regarding the proper fee. Similarly, in the Damages Case, Dr. Workman provided testimony on the proper multiplier fee for calculating the Tribe's lost grazing opportunities on the HPL from 1979 to 1995.

C. The District Court's Decision.

The *Daubert* opinion was not released until after the district court issued its rulings. Therefore, the district court did not expressly address admissibility of expert testimony by reference to *Daubert*. However, the district court carefully examined the qualifications, methodology, and opinions of both Dr. Workman and the Nation's expert on valuation, Mr. Gene Price.

To determine the proper fees, Dr. Workman used data published by the Economic Research Service in the United States Department of Agriculture ("ERS") to calculate average Arizona private range grazing fees. *See* Petitioner's Appendix ("App.") 56, 91. For the years where Arizona data was not available, Dr. Workman used ERS data on the Mountain States (which have a higher lease rate) and corrected for the average percent difference between Arizona and Mountain States grazing lease fees. *Id.* Then Dr. Workman adjusted those rates to eliminate the portion of the fee generally attributable to services not provided on the JUA/HPL. App. 57, 91-92. Mr. Price relied largely on Bureau of Land Management ("BLM") rates, which he "indexed." App. 93.

The district court rejected Mr. Price's fees. According to the court, BLM rates were the improper comparison because they were "below fair market rental" and because changes in those rates "reflect[ed] policy changes and not market changes" — a fact Mr. Price conceded. App. 93. In other words, the district court concluded that below-market rates were not "fair" rates.

The court adopted Dr. Workman's fees, explaining that:

> [t]he use of average private lease rates is reasonable when reductions are taken into account for fewer services on the HPL.

App. 59-60, 93.

The Nation filed appeals with the Ninth Circuit challenging the district court's decision on multiple grounds, including whether the district court clearly erred in admitting Dr. Workman's testimony. The Tribe appealed the district court's decision to deduct from the Tribe's recovery the value of grazing on certain "vacant range cuts."[3]

D. The Ninth Circuit Decision.

Applying an abuse of discretion standard of review, the Ninth Circuit affirmed the district court's decision to admit Dr. Workman's testimony in both the Use and Damages Cases. The Ninth Circuit noted:

> The district court thoughtfully examined the methodology and opinion of each expert, and accepted Dr. Workman's measure of damages only after making appropriate downward adjustments.

Masayesva v. Hale, 118 F.3d 1371, 1378-79 (9th Cir. 1997); App. 13. The court addressed the *Daubert* issue in one sentence:

> The Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on a novel scientific theory.

Masayesva, 118 F.3d at 1379; App. 13.

The Ninth Circuit also reversed the district court's ruling on the vacant range cuts, holding that the Tribe should be awarded damages for lost grazing opportunities on those lands. *Masayesva*, 118 F.3d at 1384; App. 27.

---

3. The "vacant range cuts" are seven range units that the Tribe could have used for grazing but chose to leave fallow in order to accelerate the restoration process. App. 25.

REASONS FOR DENYING THE WRIT

The Court should deny the petition because it fails to present any "compelling reasons" for granting the writ of certiorari as required by Sup. Ct. R. 10.

First, while a split in the circuits exists over the application of *Daubert* to "applied science" or "quasi-scientific" evidence, there is no split over *Daubert*'s application to the type of non-scientific testimony at issue here. In addition, even if there were such a split, its resolution would not affect the result in this case. The district court decision, although released pre-*Daubert*, assessed the relevance and reliability of Dr. Workman's testimony as required by *Daubert* and admitted it only after concluding that it met the test. That decision is reviewable only for an abuse of discretion and will not be overturned even if the Ninth Circuit is reversed.

Second, the narrow issue of how to interpret the specific language of comment b to § 931 of the Restatement (Second) of Torts hardly rises to the level of an "important question of federal law." Sup. Ct. R. 10(c). Moreover, it is clear the Ninth Circuit's interpretation was correct.

I.

THIS CASE IS AN IMPROPER VEHICLE FOR CERTIORARI ON *DAUBERT*.

The Tribe does not deny that the federal circuit courts differ over the application of *Daubert* to certain types of expert testimony. However, there does not appear to be a split in the circuits over the particular question at issue here — whether *Daubert*'s "relevant and reliable" test applies to non-scientific expert testimony. Moreover, because the district court reviewed Dr. Workman's testimony for relevance and reliability, the

resolution of any supposed split will not affect the outcome in this case.

A. The *Daubert* Decision.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), two minor children and their parents sued Merrell Dow Pharmaceuticals, alleging that the children's severe birth defects resulted from their mothers' ingestion of Benedictin, a prescription antinausea drug, during pregnancy. At issue was the admissibility of certain expert scientific testimony concerning the causal connection between Benedictin and the birth defects.

The Court's decision had two aspects. The first was its rejection of the so-called "*Frye* test" for determining the admissibility of novel scientific evidence. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, evidence is admissible only if derived from a method that has gained " 'general acceptance in the particular field in which it belongs.' " *Daubert*, 509 U.S. at 596 (emphasis omitted) (*quoting Frye*, 293 F. at 1014). In *Daubert*, the Ninth Circuit applied this test in upholding the exclusion of the experts' evidence. This Court reversed, explaining that *Frye* was superseded by the adoption of the Federal Rules of Evidence, and in particular by Rule 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

The second aspect of the Court's opinion, and the one pertinent here, is the Court's explanation of the district court's obligation, under Rule 702, to "ensure that any and all scientific testimony or evidence admitted is not only *relevant*, but *reliable*." 509 U.S. at 589 (emphasis added). The Court noted that Rule 702 refers to "technical, or other specialized knowledge," in addition to "scientific knowledge." *Id.* at 590 & n.8. However, "[o]ur discussion," the Court stated, "is limited to the scientific context because that is the nature of the expertise offered here." *Id.*

To assist the lower court on remand, the Court identified four non-exclusive factors that bear on "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . properly applied to the facts in issue." *Id.* at 592-93. Those factors, known as the "*Daubert* factors," are: (1) whether the theory can and has been tested; (2) whether it has been subject to peer review; (3) its rate of error; and (4) its degree of general acceptance within the relevant scientific community. *Id.* at 593-94.

Thus, in *Daubert* this Court held that under Rule 702 a district judge must serve as a "gatekeeper" to ensure that all scientific expert testimony and evidence presented in a federal courtroom is both "relevant and reliable." *Id.* at 589, 597. The "Daubert factors" were provided to assist lower courts in the "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* 589, 592-93.

B. The Circuit Split Is Over *Daubert*'s Application To Applied Science Or Quasi-Scientific Experts, Not Over *Daubert*'s Application To Non-Scientific Experts.

Since the *Daubert* decision in 1993, most circuit courts have addressed the question posed in Chief Justice Rehnquist's

opinion: whether *Daubert* applies to all categories of evidence under Rule 702, or merely to the scientific context present in *Daubert* itself? 509 U.S. at 600 (Rehnquist, C.J., joined by Stevens, J., concurring in part and dissenting in part). Petitioner argues that a split in the circuits has evolved over whether *Daubert* applies to non-scientific evidence. The split, however, is over a more narrow issue.

The circuits are divided over whether the "*Daubert* factors" are implicated in an "applied science" or quasi-science context. Thus, the circuit courts are conflicted over, for example, whether *Daubert*'s four factors apply when an engineer testifies about an alternative or defective design in a product liability case. These types of experts base their testimony on their experience and training — training that includes scientific principles at its core. However, the testimony is not the type of "novel scientific knowledge" at issue in *Daubert*. The Second, Ninth, and Tenth Circuits have held that the *Daubert* factors do not apply, while the Third, Fifth, Sixth, Seventh, and Eighth Circuits have held the opposite. *Compare McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 807 (9th Cir. 1997);[4] *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1519 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996) *with Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3d Cir. 1997); *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303-04 (6th Cir.), *cert. denied*, 118 S. Ct. 67 (1997); *Cummins v. Lyle Indus.*, 93 F.3d 362, 367-68 (7th Cir. 1996);

4. The Ninth Circuit has actually issued conflicting opinions over whether the *Daubert* factors apply to quasi-scientific expert testimony. *Compare McKendall*, 122 F.3d at 807 (refusing to apply the *Daubert* factors to product design expert); *with Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n.8 (9th Cir. 1997) (applying *Daubert* factors to turfgrass breeding, genetics and management expert). Thus, the split over this issue is intra-circuit as well as inter-circuit.

Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 297 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997).

The question presented in this case — whether *Daubert*'s "relevant and reliable" test applies to *non-scientific* expert testimony — is not controversial and has not created a split in the circuits.[5] In other words, the circuits are in agreement that in the non-scientific context, courts should apply the "relevant and reliable" test, but not the more specific *Daubert* factors. Indeed, the three cases cited by Petitioner as illustrative of the split are completely consistent with each other.

Petitioner cites the Tenth Circuit decision in *Compton* as an example of the misapplication of *Daubert*. Petitioner's Brief at 11. But, a close reading of the decision reveals that the Tenth Circuit would apply *Daubert*'s "relevant and reliable" test to all expert testimony. *Compton*, 82 F.3d at 1513 (citing *Daubert*, 509 U.S. at 589-95) (specifically stating that the trial court *always* has an obligation under Rule 702 "to make a preliminary finding that profferred expert testimony is both *relevant and reliable*") (emphasis added). In addition, *Compton* did not even deal with non-scientific expert testimony. Instead, the opinion dealt with the quasi-scientific expert testimony of an engineer regarding an alternative design in a product liability suit. Indeed, *Compton* is largely responsible for the split in the circuits described above in section I.B.[6]

---

5. Petitioner argued below that the *Daubert* factors, which are clearly designed to apply to scientific evidence, should be applied to non-scientific evidence, like Dr. Workman's testimony. Petitioner has not made this argument here, and indeed, only one circuit court case has taken such a position. *See Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995). The Sixth Circuit has apparently already adandoned that position. *See Cook v. American Steamship Co.*, 53 F.3d 733 (6th Cir. 1995) (analyzing non-scientific evidence under *Daubert*, but not applying the four factors).

6. The Ninth Circuit also applies the "relevance and reliability" (Cont'd)

Compton's holding is completely consistent with the two cases Petitioner cites as properly applying *Daubert* to non-scientific experts. Petitioner's Brief at 11. In *Tyus*, the Seventh Circuit addressing the admissibility of an advertising expert's testimony, held:

> Social science testimony . . . must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony "adheres to the same standards of intellectual rigor that are demanded in [her] profession work."

Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1996) (*quoting Braun v. Lorillard, Inc.*, 84 F.3d 230, 234 (7th Cir. 1996)), *cert. denied*, 117 S. Ct. 2409 (1997). The court explained that "*[a]t that level of generality*, the *Daubert* framework is appropriate for all kinds of expert testimony." *Id.* (emphasis added). *See also Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183 (7th Cir. 1993) (holding only that trial judge must " 'ensure that all [expert] testimony or evidence admitted is not only relevant, but reliable.' ").[7]

Although the language employed in the caselaw creates confusion over courts' holdings,[8] a hard look at the circuit court

---

(Cont'd)
test to non-scientific evidence. *See McKendall*, 122 F.3d at 807 (the "*Daubert* factors" do not apply to non-scientific expert testimony, but "relevance and reliability" test does).

7. Like *Compton*, the *Smelser* case, also cited by Petitioner, involved a quasi-scientific expert — a biomechanical engineer — and is therefore not applicable here. *Smelser v. Telsmith, Inc.*, 105 F.3d 299 (6th Cir. 1997).

8. For example, the courts often state that *Daubert* does not apply when they actually mean that the "*Daubert* factors" do not (Cont'd)

decisions reveals consistent application of *Daubert*'s "relevant and reliable" test to all expert testimony. There is no split justifying certiorari under Sup. Ct. R. 10(a).

C. Resolution Of Petitioner's Supposed Split Would Not Affect The Outcome Of This Case.

Even if this Court determined that a split exists over whether *Daubert* applies to *non-scientific* expert testimony, resolution of that split would not affect the outcome here. If *Daubert* does not apply to non-scientific expert testimony then the Ninth Circuit would be affirmed. If *Daubert* does apply to non-scientific expert testimony then the district court would still be affirmed because it considered both "relevance and reliability" when it admitted Dr. Workman's testimony.[9]

(Cont'd)

apply. *See Compton*, 82 F.3d at 1519 (stating that "*Daubert* simply has little bearing on [expert's] testimony" after previously stating that the trial court always has a duty to review profferred expert testimony for relevance and reliability). Courts have not carefully distinguished between the general gatekeeper duty to review for relevance and reliability and the more searching duty in the case of novel scientific evidence to apply the four factors in the reliability analysis.

9. The only way the district court could be reversed is if this Court holds that a trial judge must literally apply the *Daubert* factors to non-scientific expert testimony. As has been noted by many commentators, application of the four factors to non-scientific experts is often absurd. *See, e.g.*, Jennifer Laser, The Inconsistent Gatekeeping in Federal Courts: Application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to Nonscientific Expert Testimony, 30 Loy. L.A. L. Rev. 1379, 1391 (1997); Lisa M. Agrimonti, The Limitations of *Daubert* and Its Misapplication to Quasi-Scientific Experts, A Two Year Case Review of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), 35 Washburn L.J. 134, 144 (1995).

Dr. Workman — a range economist — was uniquely qualified to testify about the appropriate grazing fee. *See* Statement of the Case, Part B (detailing qualifications). Dr. Workman's calculation of the fee was straightforward. He relied on publicly available data published by the Economic Research Service in the United States Department of Agriculture. The Nation complained that Dr. Workman did not investigate the specifics of the underlying leases included in the data. However, as Dr. Workman testified and as the district court accepted, it was unnecessary to determine the specifics of the comparables because the data he used was a statistical average of a large sample of all Arizona grazing leases. This data was especially reliable because it was collected for purposes other than this litigation. *See Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 43 F.3d 1311, 1316-17 (9th Cir.) (on remand) ("that an expert testifies based on research he has conducted independent of litigation provides important, objective proof that the research comports with the dictates of good science"), *cert. denied*, 116 S. Ct. 189 (1995). Dr. Workman's testimony would certainly pass muster under *Daubert*'s reliability test, especially in light of the abuse of discretion standard of review applicable to the district court's decision. *See General Electric Co. v. Joiner*, 118 S. Ct. 512, 516 (1997) (admissibility of expert testimony reviewable under the abuse of discretion standard).

This Court should not accept certiorari because resolution of this split — if it even exists — is not central to the outcome below. As Justice Brennan once said:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution of the [conflict between the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959).

D. Other Factors Counsel Against Accepting The Writ.

There are two additional reasons this Court should deny review in this case.

First, the district court decisions below were issued in January of 1993 — six months before this Court issued *Daubert*. Thus, the lower court record contains no express analysis of the *Daubert* issue. Moreover, the Ninth Circuit's *Daubert* analysis consists of one sentence:

> The Navajo's reliance on *Daubert* is misplaced because Dr. Workman's testimony derives from his relatively straightforward application of range economics, rather than on novel scientific theory.

This sentence does not hold, as Petitioner suggests, that no aspect of *Daubert* will ever apply to non-scientific expert testimony. Indeed, a review of the Nation's brief on appeal to the Ninth Circuit reveals that the Nation argued that all the *Daubert* factors should apply to Dr. Workman's testimony. The Ninth Circuit was specifically responding to that argument. Regardless of exactly what the Ninth Circuit meant, the fact remains that the analysis of *Daubert* was cursory. As a prudential matter, review of these important issues of evidence law should await a case with a fully developed record below.

Second, this case involved a bench trial, not a jury trial. Thus, *Daubert*'s prevailing concern that jurors' lack of knowledge and training impedes their ability to assess scientific expert testimony on its merits and causes them to give the testimony too much weight is not implicated *See Daubert*, 509 U.S. at 595 ("[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it").

II.

WHETHER IT IS EQUITABLE TO PERMIT THE TRIBE TO RECOVER DAMAGES FOR LOST GRAZING OPPORTUNITIES ON THE HPL IS AN EXCEPTIONALLY NARROW ISSUE AND DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

The Nation argues that the Tribe should not recover damages for lost grazing opportunities on lands which the Tribe, after partition, decided to reserve for forests and wildlife rather than for livestock (the "vacant ranges"). The Nation claims such a recovery is inconsistent with the "principles of equity" found in the 1974 Act. But, the Nation fails to explain that the Ninth Circuit's decision was based the straightforward application of the Restatement (Second) of Torts.

The Ninth Circuit relied on comment b to § 931, which provides in pertinent part:

> The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least rental value of the . . . land during the period of deprivation. *This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time . . . .*

Restatement (Second) of Torts § 931 cmt. b (emphasis added). The Ninth Circuit correctly held that the Tribe could recover damages for the vacant ranges because "an owner can suffer deprivation even if the owner 'was not using the subject matter at the time.' " *Masayesva*, 118 F.3d at 1384; App. 27.[10]

10. Pursuant to Sup. Ct. R. 15.2, the Tribe points out that the (Cont'd)

The Nation does not argue that the Ninth Circuit applied the wrong legal standard. Instead, it merely claims that in this particular case, the application of that standard is inequitable and unfair. Whether the application of comment b to section 931 of the Restatement (Second) of Torts is equitable on these particular facts is a narrow issue indeed. As such, the Nation has failed to present an important question of federal law. Sup. Ct. R. 10(c).

The Nation raises a third argument in its petition regarding the liability of the United States. The Tribe has settled with the United States and does not take a position on that issue.

(Cont'd)
Nation misquotes the Ninth Circuit opinion at page 16 of its petition. The Nation states that the Ninth Circuit held that " 'the Hopi should be awarded damages for lost grazing opportunity on the vacant ranges . . . even though the owner [Hopi] in fact suffered no harm through the deprivation.' " The Nation actually combined the Ninth Circuit's holding with a sentence from the Restatement. *See Masayesva*, 118 F.3d at 1384; App. 26-27.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY G. ATKESON
Counsel of Record
DAPHNE WERTH
ARNOLD & PORTER
Attorneys for Respondent
The Hopi Tribe
Suite 4000
1700 Lincoln Street
Denver Colorado 80203
(303) 863-1000